

CENTRAL PLATTE NRD TESTIMONY

U.S. House of Representatives, Committee on Resources

Field Hearing - Endangered Species Act: The Platte River Cooperative Agreement and
Critical Habitats

Respectfully Submitted by Ron Bishop, General Manager

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College Park, Grand Island, Nebraska

Committee Members,

My name is Ron Bishop. I am the General Manager of the Central Platte Natural Resources District headquartered here in Grand Island. I am here today not only because of my personal interest in and commitment to the conservation of our natural resources, but am here at the specific direction of Central Platte NRD's Board of Directors who share my commitment to conserve these valuable resources.

Central Platte NRD is a Nebraska political subdivision responsible for, among other things, the development and execution of plans, facilities, works and programs relating to the development and management of fish and wildlife habitat. We have long been involved in ESA issues including the Platte River Cooperative Agreement (CA), instream flows, and critical habitat. Central Platte NRD is the holder of instream flow water rights on the central Platte River, including instream flows for the endangered and threatened piping plover, interior least tern and whooping crane. We are involved in a variety of endangered species matters in the Platte River basin including the Pallid Sturgeon/Sturgeon Chub Task Force (a coalition of entities involved in the study and management of these two endangered fishes), the Platte River Cooperative Agreement, and the Nebraska Habitat Conservation Coalition.

Platte River Cooperative Agreement -

Central Platte NRD is an active participant in the efforts of the "Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats on the Central Platte River in Nebraska (July 1997)". Under the terms of the CA, signatories are undertaking activities to plan, acquire, restore and manage land and interests in land to provide habitat for the designated target species. Our long-term involvement in this effort, through not only attending meetings but also serving on numerous committees, has provided us with insight into the process and has also given us reason for concern. We are committed to staying involved in the effort in order to keep up to speed on the process; evaluate what's going on and how it could affect Central Platte NRD and our constituents; and guide the direction of the process and influence

decisions because this Program could dictate the future of Platte Valley resources.

Our principle concerns include the following:

USFWS Target flows- The states do not believe, nor do they accept as accurate, the target flows demanded by U.S. Fish & Wildlife Service (FWS) for the Platte River.

We here in Nebraska have good reason not to believe the FWS target flow numbers. Some of those same flow numbers were used by the Nebraska Game & Parks Commission in an instream flow water rights application before the State's Department of Water Resources and FWS employees were brought in to provide the evidence to support those numbers. The water rights hearing was conducted like a district court trial, utilizing the rules of evidence and other courtroom procedures. This process allowed us and the other parties, through depositions, examination, and cross examination, to explore the "science" behind the FWS numbers. As one example of how FWS numbers held up, after reviewing all the evidence and testimony including the testimony of a FWS "expert", the State of Nebraska rejected the FWS target flow of 2400 cfs for Whooping Cranes and instead established a flow of 1350 cfs (44% less) as the flow needed to provide optimum habitat for migrating Whooping Crane. Nevertheless the original 2400 cfs for Whooping Crane flows is still being demanded by FWS in the Platte River Cooperative Agreement.

Nebraska's obligations as part of the CA, and those of all involved, must be based on independently peer reviewed and scientifically sound determinations of actual species needs for each of the FWS's target flows. Just as Central Platte NRD's and Nebraska Game & Parks' applications for instream flow water rights on the central Platte River underwent extensive scrutiny before the Nebraska Department of Water Resources, the FWS must submit it's target flows for independent scrutiny and independent, scientific peer review.

Direct and third party costs - The CA and proposed Program documents originally estimated first Increment Program costs at \$75 million. Current estimates have risen to in excess of \$146,000,000.00. Who will be burdened with paying this amount is still unresolved.

These costs are only the "program" costs and do not include all the costs associated with the restriction and limitation of Nebraska's right to use ground and surface water. These direct and third party costs must be analyzed to determine the impacts and costs of such regulatory control upon potential water users. Such actions could substantially curtail or eliminate economic development opportunities in our NRD and across central and western Nebraska. The increased costs attributable to changes required in water use and Nebraska law, to changes required in the operation and activities on Nebraska political subdivisions, and the cost of lost economic development opportunities must be determined and weighed against the real benefits of the proposed Program.

Risk of extension of federal nexus - The framers of the ESA envisioned a law that would protect species believed to be on the brink of extinction, rare species like the bald eagle and whooping crane. I believe its' fair to assume that they never imagined a law that could potentially reach out to affect the lives and operations of agricultural producers and communities who pump groundwater from wells 5 miles north of the Platte River.

The FWS has indicated that pumping groundwater that is conjunctively tied to the surface waters of the Platte is adversely affecting target flows for endangered species and therefore affecting or "taking" or "harming" the species.

They are therefore demanding that there be no new uses of surface water or groundwater that would reduce or deplete in any way their demanded "target flows". They have gone on to say that if such a program isn't developed that they have the authority, through the Endangered Species Act, to come after water users through other federal programs.

Other projects and programs with a federal connection that, according to FWS, could be used by them to regulate irrigation and other water uses include such things as:

- Crop Commodity payments
- EQIP - Environmental Quality Incentive Program
- CRP - Conservation Reserve Program
- RC&D's - Resource Conservation& Development
- PL-566
- WRP - Wetland Reserve Program
- WHIP - Wildlife Habitat Incentives Program
- Swampbuster-Wetland Conservation
- Rural Electric Program
- Conservation Technical Assistance from Department of Agriculture.

Fair share - The CA is founded on the principle that a basin wide solution for endangered species concerns in the Platte River watershed is required. This principle is in turn grounded on each of the three states and the federal government equitably sharing the costs of actions required to comply with ESA. The determination of the fair share to be contributed by each state has yet to be made. Components of the proposed Program require Nebraska to contribute far more in water and control of its natural resources and to receive less credit for resource management. The fair share concept must be applied to properly apportion ESA compliance between the states and the federal government in a manner which proportionately reflects the actual impacts of state activities on endangered species and which reflects actual water consumption.

Obstinate federal government - Cooperation and mutual trust are cornerstones of the CA process. However despite words to the contrary, federal actions to date fall far short of full and good faith cooperation. Federal representatives involved in the various CA committees have adhered to pre-compromise opinions and courses of action, in spite of reason, arguments and persuasion to the contrary by the three states and their representatives. They have failed to meet deadlines, failed to pursue courses of actions, which would avoid obstructions and, if it required compromise on the part of the DOI, failed to meaningfully respond to genuine proposals, which would have led to a Program. The FWS position was often cloaked in concerns about abdicating authority for the protection of endangered species under the ESA or veiled in oblique suggestions of the lack of any prevailing federal authority requiring a change in position.

A proposed Program is sought because the FWS have rendered opinions concerning "potential" effects on certain target species. Such opinions are based on the collective exercise of personal judgments by a small

group of FWS biologists. For FWS to maintain that within this amalgamation of human judgment, there is no basis for compromise is incredible and displays a lack of good faith. As a result of these opinions, many currently regulated and even unregulated entities, including governmental, private and commercial entities will be required to cut back, curtail or forego water use with little or no consideration of: 1) the costs to Nebraskans, 2) the impacts on vested rights, 3) the equities of such infringements, or 4) compensation for such takings and infringements.

The CA and proposed Program must require the FWS and other federal participants to sincerely pursue new methods and integrate the professional judgment of independent experts, using sound and peer reviewed science, to identify the actual water and other habitat needs of the target species.

A recent example of the FWS's obstinate and uncoordinated approach in working on the CA is the way they have dealt with the Habitat Protection Plan (HPP). Despite the efforts of a wide range of area landowners, resource specialists and habitat experts and literally years of work on the document with ample opportunity for incorporation of input, the local office of the FWS frustrated the process as it neared completion. They apparently snubbed the direction of their Regional Office in Denver and that of the Governance Committee and insisted on incorporation of their own approach. This flies in the face of the "cooperative" spirit of the effort. As a matter of policy, Program documents such as the HPP must be approved by the Governance Committee and once approved become an accepted part of the proposed Program. That is, they represent the consensus position, not solely that of the FWS or a few of its employees.

Proposed Designation of Critical Habitat for the Piping Plover-

Another timely example of the effects of ESA in the central Platte Valley involves the FWS's proposal to designate critical habitat for the piping plover. The Central Platte NRD is troubled by the FWS's approach to propose critical habitat for the piping plover and their associated supporting documents including their draft Economic Analysis and draft Environmental Assessment. We have twice submitted comments and have requested an extension of time to address these concerns. Not because the species isn't in need of reasonable conservation and management efforts, but because of the FWS's legal and factual deficiencies in the designation process. As a result of these significant shortcomings, we have formally requested the FWS withdraw the proposed critical habitat designation and redesignate critical habitat in accordance with the statutory and regulatory requirements. Our comments, and more extensive comments submitted on behalf of the Nebraska Habitat Conservation Coalition (of which Central Platte NRD is a member), can readily be made available if desired.

Our comments submitted on January 28, 2002, pointed out several key points. For example, the proposed critical habitat designation fails to comply with the mandates of the ESA. The FWS's designation of unsuitable habitat as critical habitat is arbitrary and capricious. As in the southwestern willow flycatcher case (New Mexico Cattle Growers Association et al v. U.S. Fish and Wildlife Service), the FWS is claiming that entire river reaches in Nebraska must be designated based solely on their *potential* for suitability. This directly flies in the face of the recent decision in the 10th Circuit U.S. Court of Appeals.

When the FWS listed the species, it got out of designating critical habitat by claiming that the nesting of the species is "ephemeral," i.e. the birds are always moving around and the habitat is always changing, thus, it is not possible to designate critical habitat. Now, the FWS wants to designate critical habitat on the exact same basis. The record does not square FWS's about-face. It is arbitrary and capricious.

The FWS's draft Economic Analysis of the affects of critical habitat designation also fails to comply with

the mandates of the ESA. The piping plover critical habitat designation documentation claims to analyze both the incremental impact of designation and the impacts co-extensive to listing and critical habitat designation, but it accomplishes neither.

The proposed critical habitat designation constitutes a significant threat to the present and future economic well being of many central Platte River valley communities. The FWS's proposal notes a variety of activities (both public and private) which may adversely modify critical habitat. The FWS notes that these activities include such common and necessary practices as road and bridge construction and maintenance, operation and maintenance of dams, bank stabilization projects, dredging operations, and construction of dwellings. Most disturbing, the FWS specifically note that "water development projects such as ground water withdrawal for water supply and other river depletions" could comprise an adverse modification of critical habitat and taking under ESA. Central Platte River regional economies are critically tied to municipal, agricultural, industrial and domestic water supplies provided by and associated with groundwater and with the Platte River. The designation of critical habitat will adversely affect the economic and social health of the region and must be fully evaluated.

The FWS's environmental assessment fails to comply with the mandates of the National Environmental Policy Act. The FWS claims to analyze the environmental, economic, social, historical and "custom and culture" impacts of the proposed critical habitat designation through a draft environmental assessment. In short, this document finds no environmental impact resulting from the designation of critical habitat for the piping plover. The FWS's analysis in this document is clearly erroneous and fails to comply with federal law.

Given the inappropriately short time for evaluation and comment set by the FWS and the critical importance of the economic issues related to any designation of critical habitat, the Central Platte NRD formally requested an extension of the period for review and comment for an additional 30 days. The Service's establishment of a January 28, 2002, deadline for public comment was utterly insufficient.

In comments submitted on August 10, 2001, Central Platte NRD requested copies of all necessary documents required by the NEPA and ESA. These documents include the FWS's complete alternatives analysis, detailed maps and descriptions of the bounds of the proposed critical habitat sufficient to allow the public to determine precisely the lands to be designated. The FWS has yet to correct its use of inaccurate and non-qualifying maps or provide any of the other information requested other than the draft Economic Analysis. Given the magnitude of the enforcement powers that come to the FWS with the designation of critical habitat to curtail or cease "adverse modification of critical habitat" it is essential that the critical habitat be particularly and accurately described.

Based on these comments and the FWS's absence of scientific support for the proposed designation, its lack of legal support for the designation, lack of consideration of alternative habitat management and conservation efforts and lack of appropriate evaluation of social impacts, the FWS should withdraw its critical habitat designation for the piping plover and re-issue a proposed designation, draft economic analysis and draft EA/EIS in compliance with federal law.

Need For a More Effective ESA-

Unfortunately, the ESA has failed at recovering and delisting species. Only 31 species have been delisted since 1973 - seven due to extinction and twelve due to "data error" (never should have been listed in the first place). The remaining species are either located outside of the United States (and therefore receive no

protection from ESA) or were beneficiaries of other activities such as the banning of DDT.

Particularly troubling is federal abuse of the Act that has recently come to light. The Wall Street Journal (January 24, 2002) reported on a scandal over a high-profile December 2001 survey to count threatened Canada lynx. Seven employees from the FWS, Forest Service and a state agency submitted hair samples from captive lynx and tried to pass them off as wild. When caught, the employees claimed they were testing the DNA identification process being utilized. Another explanation is that they were trying to establish lynx use in places where they don't exist, potentially blocking national forests to human use. I understand Rep. Scott McInnis (R., Colorado) has scheduled hearings into the matter, while several agencies are investigating how far the fraud extended.

A more effective ESA should incorporate the following concepts:

Respect the Primacy of State Water Law- State water law is a complex matrix that often establishes property rights to water. The ESA must be clarified to ensure that the Act is in harmony with and clearly recognizes the **primacy of state water law**.

Utilize Good Science- The law requires that every ESA action must be based on scientific information on a species or its habitat. To ensure fair and sensible decision-making, this information must be accurate and as thorough as possible. Scientific information can be improved by **requiring minimum scientific standards and fair, independent, and impartial peer review**.

Support Equitably Shared Burdens- The ESA itself calls for "encouraging" states and private parties through a system of incentives to implement a program to conserve species "for the benefits of all citizens". Contrary to this statement, ESA implementation often has been heavy-handed and inflexible, and the burdens of conservation have been placed disproportionately on private landowners and small and rural communities. If all citizens benefit from species conservation, then all citizens should help bear the costs even handedly!

Be Fair to Property Owners- Some ESA mandates have severely restricted the use and value of private property. When severe restrictions occur without compensation by the federal government, the Act shifts costs and burdens to individuals and businesses that should be shared by all citizens. The ESA must be modified to prevent these inequities and encourage landowners to welcome protection of these species. Specifically, when private property is preserved in habitat conservation plans, the landowner must be compensated in a timely fashion.

Establish Cost Effective Recovery Plans- Recovery plans are expensive to implement. Many of the costs are the direct expenses and lost opportunities of private parties and state and local governments. Costs to non-federal parties should be minimized by requiring implementation of the least costly recovery plan that would achieve the recovery of the species.

Provide Incentives to Conserve Habitat- ESA restrictions apply when land or water serves as habitat for endangered species. To avoid ESA regulation, some property owners have destroyed habitat to discourage the entry of protected species. The Act should be amended to provide incentives for property owners to conserve, rather than destroy, habitat and to provide regulatory certainty to property owners who voluntarily participate in conservation plans.

Encourage Public Participation- Private citizens, businesses and communities, especially those directly

affected by conservation decisions, should have a prominent role in the ESA decision-making process. The Act should provide for earlier and more meaningful opportunities for citizens to participate, more citizen involvement in recovery plans, critical habitat designations and a more prominent role in the consultations process for applicants for federal permits.

I believe our experiences here in the Platte Valley with regards to ESA clearly point out the need for these modifications in the ESA. An ESA amended to incorporate these concepts would better aid the Nation in the resolution of complex endangered species issues and help avoid the train wrecks that have plagued the implementation of the existing law. In the process we, here in Nebraska, can better protect the habitats of the central Platte River and the species that rely on them.

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